

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL,
INC.,

Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY, et al.,

Respondents.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether this Court should consider petitioner's claim that the Environmental Protection Agency ("EPA") acted unlawfully by considering feasibility in deciding whether to adopt proposed amendments to its vinyl chloride standard, when petitioner failed to challenge the current vinyl chloride standard in court and did not participate in the administrative proceedings on either the current standard or the proposed amendments.

2. Whether Congress intended to require that EPA, in all cases, must promulgate zero-risk standards under Section 112 of the Clean Air Act that would completely prohibit all

51 emissions of vinyl chloride and any other pollutant for which a
52 health effects threshold cannot be defined, even when such a
53 standard would result in the closure of entire industries with-
54 out producing any significant improvement in public health pro-
56 tection as compared to a standard that takes feasibility into
57 account.

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60 RULE 8(b) STATEMENT

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62 The pending case was not previously before this Court
63 or any other court. Similar issues relating to EPA's regula-
64 tion of hazardous air pollutants are presented in the following
65 proceedings presently pending before this Court: Natural
66 Resources Defense Council, Inc. v. Thomas, Nos. 84-1387, et al.
67 (benzene); and Environmental Defense Fund, Inc. v. Thomas,
68 Nos. 84-1524, et al., Natural Resources Defense Council, Inc.
70 v. Thomas, Nos. 85-1123, et al., and American Mining Congress
71 v. Environmental Protection Agency, Nos. 85-1285, et al.
72 (radionuclides).

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75 STATEMENT OF THE CASE

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78 On December 24, 1975, EPA listed vinyl chloride
79 ("VC") as a hazardous air pollutant under Section 112 of the
80 Clean Air Act (the "Act"), 42 U.S.C. § 7412 (1982), and pub-
80 lished a proposed national standard limiting VC emissions from

32 various source categories. 40 Fed. Reg. 59477, 59532. In the
33 standard-setting proposal, EPA took the position "that there is
34 no atmospheric concentration [of vinyl chloride or any other
35 carcinogen] that poses absolutely no public health risk," so
36 that a "zero emission limitation would be the only emission
37 standard which would offer absolute safety from ambient
38 exposure." 40 Fed. Reg. at 59534.

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41 The agency did not, however, require "absolute
42 safety" by proposing a complete prohibition of VC emissions.
43 Such a requirement, EPA observed, would have resulted in clo-
44 sure of the entire industry and produced serious, adverse eco-
45 nomic and social impacts.^{1/} At the same time, EPA noted that
46 there were a variety of "beneficial vinyl chloride products for
47 which desirable substitutes are not readily available," and it
48 observed that substitutes for vinyl chloride have not been
49 thoroughly studied and present "potentially adverse health and
50 environmental impacts" of their own. 40 Fed. Reg. at 59534.
51 In light of these considerations and the fact that available

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54 1/ See id. at 59534. The Environmental Defense Fund
55 ("EDF"), the principal environmental interest group
56 participating in the VC proceedings, concurred in this assess-
57 ment, stating: "It is generally agreed [that requiring a zero
58 emission level] would force the industry to shut down." State-
59 ment of Robert Rauch and David Medine [of EDF] at the
60 Environmental Protection Agency's Public Meeting on the pro-
61 posed Amendments to the Final Emission Standard for Vinyl Chlo-
62 ride (July 19, 1977) at 4.

12 control technology was "capable of substantially reducing emis-
13 sions of vinyl chloride into the atmosphere, EPA concluded that
14 setting zero emission limits would be neither desirable nor
15 necessary." Id.

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17 In October 1976, EPA promulgated the final vinyl
18 chloride standard, which was modeled closely on its December
19 1975 proposal. 41 Fed. Reg. 46560. Like the proposal, the
20 final standard required covered plants to reduce VC emissions
21 to the level attainable using the best available control tech-
22 nology but did not prohibit VC emissions entirely. Petitioner
23 NRDC, which had not commented on the proposed standard, did not
24 challenge the final standard in court. A petition for review
25 was filed by EDF, but the petition was dismissed pursuant to a
26 settlement agreement requiring EPA to publish proposed amend-
27 ments to the standard that were designated in the settlement
28 agreement.

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35 The proposed amendments, published on June 2, 1977
36 (42 Fed. Reg. 28154), would have made the standard more strin-
37 gent in certain respects, but would not have imposed a
38 zero-emissions (or no measurable emissions) limitation.
39 Instead, they would have lowered permissible VC emission levels
40 based upon a different assessment of feasibility and available
41 control technology than the one on which the 1976 standard was
42 based. As under the 1976 standard, a very small, but finite
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45 level of cancer risk to the general public would still have
46 existed under the proposed amendments if, like NRDC, one sub-
47 scribes to the position that any non-zero level of exposure to
48 vinyl chloride presents some finite risk of cancer. Despite
49 this, NRDC did not comment on the proposed amendments.^{2/}

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57 On January 9, 1985, EPA published its decision to
58 withdraw the proposed amendments. 50 Fed. Reg. 1182. The
59 agency noted that the current standard has reduced VC emissions
59 by 95 percent and that, under the standard, the risks
60 attributed to VC exposures from all covered sources are only
61 0.55 cases of cancer per year nationwide. Id. The only action
62 that would eliminate this very small residual health risk
63 entirely, the agency found, would be a complete ban on the pro-
64 duction and use of vinyl chloride, which would result in clo-
65 sure of the entire industry. Id. at 1182-1183. EPA restated
66 its earlier conclusion that such drastic action was not desir-
67 able or necessary and proceeded to consider whether emission
68 limitations more stringent than those contained in the current
69 standard (but not a complete prohibition of emissions) should
70 be adopted. It concluded that, short of industry closure,

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750 ^{2/} EDF did file comments on the proposed amendments,
751 characterizing them as "sound" and urging their promulgation.
752 See Comments of the Environmental Defense Fund on the Proposed
754 Amendments to the Final Emission Standard for Vinyl Chloride at
755 3.

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2 there did not appear to be a feasible means of achieving any
3 significant additional margin of protection for the public
4 health. Accordingly, the proposed amendments were withdrawn.

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8 SUMMARY OF ARGUMENT

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11 [To Be Provided]

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14 ARGUMENT

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19 I. This Court Should Not Consider the Claims Raised in
20 Petitioner's Brief.

21 NRDC claims that EPA's decision to withdraw the pro-
26 posed amendments to the vinyl chloride standard was unlawful
28 because it was not based solely on health-related factors, but
29 instead reflected considerations of technological feasibility
31 and, to a lesser extent, cost. Whatever the merits of this
32 claim may be (and we believe it to be without merit), the fact
34 is that it would be equally applicable to the current standard
35 (adopted in 1976) and to the proposed amendments whose with-
36 drawal NRDC is challenging here. By raising the claim now,
37 NRDC really is attempting to attack the current standard col-
38 laterally and is asking this Court to consider an objection
39 that was not presented to the agency.

11 As indicated above, despite EPA's finding that no
12 level of exposure to vinyl chloride other than zero is abso-
13 lutely safe, neither the standard adopted in 1976 nor the pro-
15 posed amendments prohibited emissions of vinyl chloride
16 entirely. To the contrary, both explicitly reflected some con-
17 sideration of feasibility. Thus, the legal claim that NRDC
18 advances in the present case could have been advanced with
19 equal force in a challenge to the 1976 standard or by way of
20 comment on the proposed amendments. But NRDC did not challenge
21 the standard in 1976 and did not comment on the proposed amend-
22 ments. In these circumstances, Section 307(b) of the Clean Air
23 Act, 42 U.S.C. § 7607(b), and traditional canons of administra-
24 tive law preclude NRDC from raising this claim now.

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27 Section 307(b)(1), 42 U.S.C. § 7607(b)(1), requires
28 that a petition for review of action of the Administrator in
29 promulgating any emission standard or requirement under Section
30 112 must be filed within 60 days of the date on which notice of
31 such promulgation appears in the Federal Register.^{3/} Since
39 notice of promulgation of the current standard appeared in the

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32 3/ At the time the vinyl chloride standard was promul-
33 gated in 1976, the period within which a petition for review
34 had to be filed was only 30 days. See 42 U.S.C. § 1857h-5(b)
35 (1976). The 1977 Clean Air Act Amendments extended this period
36 to 60 days. See Group Against Smog and Pollution, Inc. v. EPA,
38 665 F.2d 1284, 1289 & n.39 (D.C. Cir. 1981).

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40 Federal Register in October 1976, it clearly is too late to
42 challenge the current standard on the ground that it reflects
43 considerations of feasibility and fails to prohibit VC emis-
44 sions entirely.^{4/} Yet that is precisely the nature of the
51 challenge that NRDC seeks to present to this Court. But if the
52 vinyl chloride standard is unlawful now because it does not
53 prohibit VC emissions entirely, it was unlawful in October 1976
53 for the very same reason. Indeed, if NRDC's interpretation of
54 Section 112 is correct, even the proposed amendments to the
55 standard would have been unlawful if they had been promulgated
57 by EPA, for they, too, reflected considerations of feasibility.
58 Yet NRDC stood silent when the standard was adopted in 1976 and
59 remained silent when the proposed amendments were published in
60 1977.

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62 By raising the "ample margin of safety" issue in the
64 context of a challenge to EPA's withdrawal of the proposed
65 amendments, NRDC is attempting now to do indirectly what it is
66 forbidden by statute from doing directly."^{5/} As this Court has

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44 4/ As the Fifth Circuit recently noted, the Clean Air
45 Act "is clear about one thing, . . . an emissions standard is
46 subject to judicial review only . . . if the petition for
47 review is filed within 60 days of the Administrator's action."
48 United States v. Ethyl Corp., ___ F.2d ___ (5th Cir. June 3,
49 1985), slip op. at 4642.

67 5/ Natural Resources Defense Council v. Nuclear
69 Regulatory Comm'n, 666 F.2d 595, 601 (D.C. Cir. 1981).

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70 recognized, timeliness requirements such as the one contained
71 in Section 307(b)(1) are jurisdictional in nature and "reflect
73 'a deliberate congressional choice to impose statutory finality
74 on agency orders"6/ If this Court were to entertain
81 NRDC's claim now, it would undermine this deliberate congress-
82 sional choice.7/

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90 The present case is a perfect example of why the
91 policy embodied in Section 307(b)(1) should be respected. If
92 NRDC had challenged the current standard in 1976 and obtained a
93 favorable ruling on its present claim, the vinyl chloride
94 industry could have avoided spending enormous sums of money to
95 comply with an invalid standard, and over seven years of
96 administrative proceedings on the proposed amendments to the
97 standard could have been avoided, since such a ruling would
98 have indicated that the proposed amendments, if adopted, would
00 themselves be unlawful.

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74 6/ Eagle-Picher Industries, Inc. v. United States
75 Environmental Protection Agency, ___ F.2d ___, Nos. 83-2259, et
76 al. (D.C. Cir. April 16, 1985), slip op. at 12, quoting City of
77 Rochester v. Bond, 603 F.2d 927, 935 (D.C. Cir. 1979); Natural
79 Resources Defense Council v. Nuclear Regulatory Comm'n, 666
80 F.2d 595, 602 (D.C. Cir. 1981).

82 7/ Cf. United States v. Ethyl Corp., ___ F.2d ___, slip
84 op. at 4644 (the clear language of Section 307(b)(1) reflects
86 "Congress's manifest intent to avoid protracted and inconsis-
87 tent adjudications over the validity of EPA emission stan-
88 dards").

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36 declining to entertain such challenges is obvious: permitting
37 "a person to stand aside and speculate on the outcome [of a
38 rulemaking proceeding]; if adversely affected, come into this
39 court for relief; and then permit the whole matter to be
40 reopened in his behalf, would create an impossible situa-
41 tion."^{11/}

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46 The fundamental legal objection that NRDC seeks to
47 raise in the present case clearly was known to NRDC at the time
47 of the period for public comment on the proposed amendments.
49 Yet NRDC did not raise its present objection during the period
51 for public comment;^{12/} nor did it participate in that proceed-
63 ing in any way. It, therefore, should not be permitted to

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3 [Footnote continued from preceding page]

34 Comm'n, 513 F.2d 1045, 1054 (D.C. Cir. 1975); Gage v. Atomic
35 Energy Comm'n, 479 F.2d 1214 (D.C. Cir. 1973).

41 ^{11/} Nader v. Nuclear Regulatory Comm'n, 513 F.2d at
42 1054-1055, quoting Red River Broadcasting Co. v. FCC, 98 F.2d
43 282, 286-87 (D.C. Cir.), cert. denied, 305 U.S. 625 (1938).

51 ^{12/} NRDC does not suggest that anyone else objected to
53 the proposed amendments on the ground that they reflected con-
54 siderations of feasibility either. As noted above, EDF signed
55 a settlement agreement calling for publication of the proposed
56 amendments, characterized them as "sound" in its comments, and
57 urged their promulgation. Thus, EDF cannot be said to have
58 raised the objection that any action of the Administrator in
59 promulgating a standard that does not prohibit all VC emissions
60 would be unlawful. Nor are we aware of any other party who
61 raised such an objection in comments on the proposed amend-
62 ments.

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64 raise what amounts to an objection to the 1976 standard and to
65 the proposed amendments at the present time.^{13/}

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69 II. EPA's Application of the "Ample Margin of Safety"
70 Provision of Section 112 Has Been Entirely Reasonable and
71 Consistent With Congressional Intent.

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77 As discussed above, this Court need not reach the
78 merits of NRDC's claim in the present case. If NRDC's petition
79 for review is considered on the merits, however, it still
80 should be dismissed, since EPA's interpretation and application
81 of the "ample margin of safety" provision of Section 112 has
82 been entirely reasonable and consistent with congressional
83 intent. In this part of our brief, we will show the following:
84 (1) NRDC's zero-risk/zero-emissions interpretation of Section
85 112 would have drastic social and economic consequences that
86 Congress clearly did not intend; (2) The language of Section
87 112 does not require EPA to establish zero-risk/zero-emissions
88 standards; (3) The legislative history of Section 112 cannot
89 fairly be read to preclude any consideration of feasibility in
90 the setting of emission standards for non-threshold pollutants;
91 and (4) EPA's interpretation of Section 112 is reasonable and
92 should be respected by this Court.

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39 A. If Adopted, Petitioner's Position Would Have a
40 Devastating Economic and Social Impact.
41

45 Petitioner's position in the present case is simple,

46 if extreme: A Section 112 standard for a carcinogen such as
47 vinyl chloride (or for any other pollutant as to which no clear
48 health effects threshold has been defined) must prohibit emis-
49 sions of the pollutant entirely, regardless of the conse-
50 quences. See Brief for Petitioner ("Pet. Br." at 14, 30). The
51 fact that such a zero-emissions standard might be technologi-
52 cally infeasible and cause an entire industry to shut down is
53 irrelevant in NRDC's view, because industry closure, NRDC
54 asserts, is just the result that Congress contemplated in the
55 case of a pollutant which may present a health hazard at any
56 level of exposure. See id. Consequently, the argument goes,
57 if EPA gives any consideration at all to feasibility, rather
58 than simply prohibiting all emissions of a non-threshold
59 pollutant like vinyl chloride entirely, the agency acts unlaw-
60 fully.

61
62 The implications of this position are staggering.

63 There are literally dozens and perhaps hundreds of so-called
64 "non-threshold" pollutants -- i.e., pollutants for which no
65 clear health effects threshold has been defined. The primary
66 examples of such pollutants are carcinogens, which EPA presumes
67 to present a risk of cancer at any level of exposure above

28 zero. See EPA's Airborne Carcinogen Policy, 44 Fed. Reg.
29 58642, 58660 (1979). There may well be more than a hundred
30 carcinogens or potential carcinogens which, as NRDC would apply
31 the test, should be subject to regulation under Section 112.14/
46 If these substances were subjected to zero-risk/zero-emissions
47 standards, the impact could be devastating.

49
51 EPA outlined the consequences of NRDC's present
52 position almost six years ago in proposing its Airborne
53 Carcinogen Policy.

54
57 A requirement that the risk from atmo-
57 spheric carcinogen emissions be reduced to
58 zero would produce massive social disloca-
59 tions, given the pervasiveness of at least
60 minimal levels of carcinogenic emissions in
60 key American industries. Since few such
61 industries could soon operate in compliance
62 with zero-emission standards, closure would
63 be the only legal alternative. Among the
64 important activities affected would be the
65 generation of electricity from either
65 coal-burning or nuclear energy; the
66 manufacturing of steel; the mining, smelt-
67 ing, or refining of virtually any mineral

67
32 14/ Thus, NRDC states: "Substances capable of causing
33 serious, usually fatal diseases such as cancer obviously
34 qualify as hazardous air pollutants." Pet. Br. at 4. The
35 National Toxicology Program has identified more than 100 sub-
36 stances or groups of substances that are either known to be
37 carcinogenic or that may reasonably be anticipated to be
38 carcinogens. See U.S. Department of Health and Human Services
39 (National Toxicology Program), Third Annual Report on
40 Carcinogens (Summary, September 1983). In a recent appearance
41 before the Subcommittee on Health and the Environment of the
42 House Energy and Commerce Committee, a spokesman for NRDC
43 testified: "Dozens of toxic compounds are commonly found in
44 the air breathed by millions of Americans." Testimony of David
45 D. Doniger on H.R. 2576: The Toxic Release Control Act of 1985
46 (June 11, 1985) at 1.

(e.g., copper, iron, lead, zinc, and limestone), the manufacture of synthetic organic chemicals; and the refining, storage, or dispensing of any petroleum product.^{15/}

EPA's general conclusion on this point has been reaffirmed in the context of specific Section 112 standard-setting proceedings. For example, in the inorganic arsenic proceeding, EPA noted that the health risk attributable to arsenic emissions from primary lead smelters is extremely low and that the only way to reduce this very low health risk further would be to close the plants.^{16/} The agency concluded that such drastic action was not reasonable in light of the very low level of risk that exists when the plants are permitted to continue operating using the best available control technology.^{17/} Similar conclusions were reached for several other source categories of inorganic arsenic emissions, where the very low

^{15/} 44 Fed. Reg. at 58660. Nor would the impact be limited to the industrial sector of our economy. Since products of incomplete combustion also are thought to be carcinogenic, non-industrial activities as widespread as the burning of wood in home fireplaces also could be subject to prohibition under NRDC's interpretation of Section 112. See id. at 58660 n.20. The same might be true of municipal landfills, wastewater treatment plants, dry cleaners, and other non-industrial sources of non-threshold pollutants. See EPA, "The Air Toxics Problem in the United States: An Analysis of Cancer Risks for Selected Pollutants," pp. 55-66, 78-82 (May 1985).

^{16/} See Proposed Standard for Inorganic Arsenic, 48 Fed. Reg. 33112, 33117 (1983).

^{17/} See id.

05 level of risk achieved through the use of feasible technology
06 could be eliminated only by closing down the industry.^{18/}

11 The same was found to be true in the case of vinyl
12 chloride. Thus, in withdrawing the proposed amendments in
14 January of this year, EPA observed: "To eliminate the risk of
16 VC exposure entirely, a complete prohibition of all VC emis-
17 sions would be necessary. This would require the closure of
18 the entire industry and result in serious, adverse economic
19 impacts." 50 Fed. Reg. at 1183.^{19/}

23
25 In short, NRDC's zero-risk/zero-emissions interpreta-
26 tion of Section 112 would have the most far-reaching and dras-
28 tic consequences for our nation's economy and could result in
29 massive social dislocation. According to NRDC, these cata-
31 clysmic results are just what Congress had in mind, even though
33 no one in Congress suggested that this would be the result of
34 enacting Section 112. In the pages that follow, we will demon-
35 strate that the language of Section 112 can and should be read
36 more reasonably than NRDC suggests, so that a
37 zero-risk/zero-emissions limitation is not required for
38 non-threshold pollutants. We also will show that this more

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541
506 ^{18/} See id. at 33117 (primary zinc smelters); id. at
507 33117-33118 (zinc oxide plants); id. at 33118 (arsenic chemical
508 manufacturing plants).

519 ^{19/} As noted above, EDF concurred in the assessment that
520 requiring a zero-emissions level for vinyl chloride would force
521 the industry to shut down. See p. 3 n.l., supra.

40 reasonable reading of Section 112 is fully supported by th
41 legislative history and is entirely consistant with the intent
42 of Congress.

43
44 B. The Standard-Setting Language of Section 112 Does Not
45 Require EPA To Establish Zero-Risk/Zero-Emissions
46 Standards.

47
48 Section 112(b)(1)(B) of the Clean Air Act directs the
49 Administrator of EPA to establish a standard for hazardous air
50 pollutants "at the level which in his judgment provides an
51 ample margin of safety to protect the public health."
52 Petitioner NRDC reads this phrase as requiring EPA to set
53 risk-free standards for all hazardous air pollutants. To NRDC,
54 the word "safety" means absolute safety, which, in the case of
55 a non-threshold pollutant such as vinyl chloride, can be
56 achieved only if emissions of the substance are prohibited
57 entirely, regardless of the consequences.

58
59 But this zero-risk construction is not the most rea-
60 sonable reading of the word "safety" or of the phrase "ample
61 margin of safety." To the contrary, as the Supreme Court has
62 observed,

63
64 "safe" is not the equivalent of
65 "risk-free." There are many activities
66 that we engage in every day -- such as
67 driving a car or even breathing city air --
68 that entail some risk of accident or
69 material health impairment; nevertheless,
70 few people would consider these activities
71 "unsafe."^{20/}

72
73
74 20/ Industrial Union Dep't, AFL-CIO v. American Petroleum
75 Inst., 448 U.S. 607, 642 (1980) (emphasis added).

2 In order to be characterized as "unsafe," the Supreme Court
3 stated, an activity or situation must present a "significant
4 risk of harm."21/

9
10 Nor does the concept of a "margin of safety" require
11 that risks be eliminated entirely. Rather, as EPA has pointed
12 out, Congress borrowed the concept of a "margin of safety" from
13 the field of engineering, where the term had previously been
14 employed in the Federal Coal Mine Health and Safety Act of
15 1969, 30 U.S.C. § 874(a).22/ While the margin of safety con-
16 cept was intended to minimize safety risks to miners, such as
17 the risk that a hoist cable might give way, Congress surely
18 understood that providing a margin of safety in that context
19 would not "guarantee a failure risk of zero."23/

22
23 Thus, the concept of an "ample margin of safety" is
24 perfectly compatible with the existence of some residual level
25 of risk. If Congress had wanted to completely prohibit emis-
26 sions of every non-threshold air pollutant that is hazardous to

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34 21/ Id. Similarly, Professor Currie has pointed out that
35 the phrase "safe or healthful" as used in the Occupational
36 Safety and Health Act of 1970 allows "room for some play."
37 David P. Currie, "OSHA," 1976 Am. Bar Foundation Research J.
38 1107, 1134 (1976).

36 22/ See EPA's Airborne Carcinogen Policy, 44 Fed. Reg. at
37 58660.

01 23/ Id.

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07 health, it surely knew how to do so explicitly, for it came
08 very close to taking precisely that approach in Section 115 of
10 the Senate bill from which Section 112 of the Act was
11 derived.^{24/} The prohibition requirement was abandoned, how-
16 ever, in favor of the "ample margin of safety" concept. More-
17 over, the determination of what level of emissions is consis-
19 tent with an ample margin of safety was committed to the
20 judgment of the Administrator.

21
22 By providing for the adoption of standards, rather
23 than prohibiting emissions outright, and by calling for the
24 exercise of the Administrator's judgment in setting the stan-
25 dards, Congress opted for a more flexible approach than the
26 zero-risk/zero-emissions position advocated by NRDC.^{25/}
33 Instead of dictating the result that EPA must reach in all
34 cases, Congress "left it to the Administrator to pour content
35 into these relatively broad concepts" of emission standards
37 reflecting an ample margin of safety.^{26/}

39 _____
39
41 ^{24/} See Section 115 of S.4358 in A Legislative History of
42 the Clean Air Act Amendments of 1970, Comm. Print No. 18, Sen-
43 ate Comm. on Public Works, 93rd Congress, 2d Sess. 565 (1974)
44 (hereafter referred to as "1970 Leg. Hist.").

46 ^{25/} The approach taken in Section 112 also contrasts with
48 the far more absolute command of statutes such as the Delaney
49 Clause of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §
50 348(c)(3)(A), which provides simply and unequivocally that "no
51 additive shall be determined to be safe if it is found to
52 induce cancer when ingested by man or animal."

57 ^{26/} United States v. Ethyl Corp., ___ F.2d ___, slip op.
58 at 4642.

40 Perhaps the best indication of the fragility of
41 NRDC's textual argument is the fact that it focuses not on what
42 Section 112 says but on what it fails to say. Section 112, as
43 NRDC points out, does not expressly direct the Administrator to
44 set standards based upon considerations of technological
45 feasibility and cost. Nor, however, does it expressly preclude
46 the Administrator from considering such factors. Nonetheless,
47 NRDC asserts that the absence of a specific, affirmative man-
48 date to consider feasibility means that feasibility cannot be
49 considered at all in the setting of emission standards under
51 Section 112. For, according to NRDC, the courts "have ruled
52 that an agency charged with setting standards to protect public
53 health from dangerous pollutants cannot . . . take technologi-
54 cal or economic considerations into account unless the statute
55 expressly so provides." Pet. Br. at 14. This proposition does
57 not withstand analysis.

58
59 The case on which NRDC places principal reliance,
60 American Textile Manufacturers Institute v. Donovan, 452 U.S.
61 490 (1981), did not hold that an agency charged with setting
62 standards to protect the public health cannot take technologi-
63 cal or economic considerations into account unless the statute
64 expressly so provides. To the contrary, the Court observed
65 that technological and economic considerations did have to be
66 taken into account under the statute at issue in that case, the

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67 Occupational Safety and Health Act of 1970 ("OSH Act"), 29
68 U.S.C. §§ 651, et seq. (1982). The only question at issue was
69 how they should be taken into account. The Court concluded
73 that, under the OSH Act, these factors should be taken into
74 account through a feasibility analysis rather than a
75 cost-benefit assessment.^{27/} Since NRDC's claim here is that
83 EPA cannot take technological feasibility or costs into account
84 in any way whatsoever under Section 112 of the Clean Air Act,
85 the Supreme Court's finding that cost-benefit analysis is not
86 required under the OSH Act has no bearing on the present case.

88
89 Nor are this Court's decisions in Lead Industries
90 Association, Inc. v. EPA, 647 F.2d 1130, cert. denied, 449 U.S.
90 1042 (1980), or Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir.
91 1978), on point. In the Lead Industries case, the court
92 deferred to EPA's view that it is not required to consider eco-
93 nomic or technological feasibility in setting primary ambient
94 air quality standards designed to achieve an "adequate margin
95 of safety" under Section 109 of the Clean Air Act, 42 U.S.C. §
96 7409 (1982).^{28/} Unlike Section 112 emission standards,

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706 27/ See American Textile Mfrs. Inst. v. Donovan, 452 U.S.
707 at 509 ("Thus, cost-benefit analysis by OSHA is not required by
708 the statute because feasibility analysis is."). Moreover, the
709 Court acknowledged that a requirement for cost-benefit analysis
710 could be imposed through the use of general language, such as
711 the term "unreasonable risk." See id. at 510 n.30.

706 28/ See Lead Industries Association, Inc. v. EPA, 647
707 F.2d at 1148. In reaching its decision, the Court observed:

3 [Footnote continued next page]

'01 However, Section 109 ambient air quality standards do not actu-
'02 ally impose pollution control requirements on any emitting
'03 sources.^{29/} Rather, they serve as the basis for the develop-
'04 ment by individual states of implementation plans. These
'05 implementation plans, in turn, impose emission limitations on
'07 various emitting sources within the state in order to achieve
'08 the ambient air quality level specified in the Section 109
'09 standard. See id. —

'10
'11 Under the Clean Air Act, states are free to consider
'12 economic and technological feasibility in selecting the mix of
'13 control devices that will be utilized under the implementation
'14 plan to achieve the required ambient air quality levels. Con-
'16 sequently, the fact that feasibility is not considered in
'17 setting the Section 109 standard itself does not mean that
'18 individual plants, let alone entire industries, would have to
'19 close because of an inability to comply with an emissions limi-
'20 tation. To the contrary, as the Supreme Court has noted,
'22 "industries with particular economic or technological problems
'23 may seek special treatment in the [state implementation] plan

'29 _____
'29
3 [Footnote continued from preceding page]

3
'98 "Unless it can be shown that the Administrator's construction
'99 of the statute is plainly unreasonable, we must uphold his
'00 interpretation." Id. at 1147.

'03 ^{29/} See id. at 1149 n.37.

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724 itself."^{30/} By contrast, Section 112 standards apply directly
729 to specific emission sources. Thus, the effects of a Section
730 112 standard prohibiting emissions of vinyl chloride (or any
732 other non-threshold pollutant) could not be mitigated by the
735 development of a state implementation plan that considers
736 feasibility.

737
738 In short, while Congress may have intended
740 feasibility to be taken into account when Section 109 standards
741 are implemented by the individual states rather than when the
742 standards themselves are formulated by EPA, it provided no such
743 role for the states under Section 112. Instead, as indicated
744 in the legislative history,^{31/} Congress intended that EPA could
746 consider feasibility at the standard-setting stage in regu-
746 lating non-threshold pollutants.

747
749 The Hercules decision, which held that EPA is not
750 required to consider economic and technological feasibility in
751 setting effluent standards for toxic pollutants under Section
752 307(a) of the Clean Water Act, 33 U.S.C. § 1317(a) (1982), also
753 is clearly distinguishable from the present case. For one

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724 ^{30/} Union Electric Co. v. EPA, 427 U.S. 246, 266. Tech-
725 nological and economic factors can be taken into account in the
726 enforcement of the state implementation plan as well. See id.
728 at 266-269.

744 ^{31/} See pp. - - - , infra.

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54 thing, Section 307 of the Clean Water Act specifically autho-
56 rizes EPA to publish "a proposed effluent standard (which may
57 include a prohibition)." Section 112 of th Clean Air Act, by
58 contrast, makes no reference to the adoption of a prohibition
59 of emissions; indeed, as discussed below, Congress specifically
60 rejected the idea of requiring a prohibition of emissions under
61 Section 112. This significant difference in the language of
62 Section 307 and Section 112 is evidence that Congress did not
63 intend the phrase "ample margin of safety" to have the same
65 meaning in both cases.

66
67 Moreover, Section 307(a)(2) of the Clean Water Act
68 specifies six particular factors, none of which relates to
69 feasibility, that the Administrator must take into account in
71 dev loping effluent standards designed to provide an "ample
7 margin of safety" for toxic water pollutants.^{32/} Section 112
84 of the Clean Air Act, by contrast, is silent on this question,
85 leaving the term "ample margin of safety" completely undefined
86 and thus more fully committed to the discretion of the

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88
73 ^{32/} See Hercules, Inc. v. EPA, 598 F.2d at 111. The
76 factors are "the toxicity of the pollutant, its persistence,
77 degradability, the usual or potential presence of the affected
78 organisms in any waters, the importance of the affected
79 organisms and the nature and extent of the effect of the toxic
80 pollutant on such organisms, and the extent to which effective
81 control is being or may be achieved under other regulatory
82 authority." 33 U.S.C. § 1317(a)(2).

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87 Administrator. This is further evidence that the term "ample
88 margin of safety" should not be deemed to have th same meaning
89 in the two different statutes.^{33/}

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12 In short, the cases on which NRDC relies to support
13 its extreme reading of Section 112 simply are not in point.
14 The fact is that only one decision of this Court comes close to
15 interpreting the "ample margin of safety" provision of Section
16 112 itself. In that case, National Association of Demolition
17 Contractors, Inc. v. Costle, 565 F.2d 748 (D.C. Cir. 1977), the
18 court recognized that the "ample margin of safety" language of
19 Section 112 does not require EPA to prohibit the demolition of
20 asbestos-containing buildings during sub-freezing temperatures,
21 even though the wetting process to control asbestos emissions
22 cannot be used safely at such temperatures. To achieve a
23 zero-risk/zero-emissions standard for asbestos, EPA would have

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25

26 33/ A third important distinction is that Section 307 of
27 the Clean Water Act merely authorizes the Administrator, in his
28 discretion, to establish effluent standards for toxic water
29 pollutants. In exercising this discretion, the Administrator
30 presumably could take economic and technological feasibility
31 into account. If he determined that it would be infeasible to
32 comply with an effluent standard and that widespread industry
33 closure would result, the Administrator might exercise his dis-
34 cretion not to propose any such standard. By contrast, Section
35 112 of the Clean Air Act appears to require the Administrator
36 to promulgate at least one emission standard for any substance
37 which he retains on the list of hazardous air pollutants.
38 Thus, unless feasibility can be taken into account in setting
39 Section 112 standards, Section 112, unlike Section 307 of the
40 Clean Water Act, could result in widespread industry closure.

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24 had to prohibit demolition entirely in sub-freezing tempera-
25 tures, a result which should have been required if NRDC is cor-
26 rect in asserting that feasibility cannot be considered under
27 Section 112. Yet the court approved EPA's decision to allow
28 demolition to continue, finding "no basis for concluding that
30 th Administrator, in providing a limited exception to the
31 wetting requirement to protect worker safety, acted in anything
32 other than a reasonable fashion, consistent with the law." Id.
33 at 753

34
36 In sum, the language of Section 112 does not
37 require EPA to establish zero-risk/zero-emissions standards
39 for non-threshold pollutants, and the decisions of the Supreme
40 Court and this Court do not hold otherwise.

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44 C. The Legislative History of Section 112 Is Consistent
47 With a Regulatory Approach That Does Not Require the
48 Prohibition of All Emissions in the Case of
49 Non-Threshold Pollutants.

50
54 NRDC attempts to support its extreme reading of Sec-
55 tion 112 by reference to three statements in the legislative
56 history of the Clean Air Act Amendments of 1970. Two of these
57 statements relate to the Senate bill, S.4358, and the third
58 relates to Conference Committee action.

59
60 First, NRDC points to a sentence in the Senate Report
61 pertaining to Section 115 of S.4358, the provision which, after

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63 modification in Conference Committee, became Section 112 of the
64 Clean Air Act. Section 115, the sentence states, would require
66 EPA to publish a proposed prohibition of emissions of a
67 pollutant found to be hazardous to the health of persons.^{34/}
69 NRDC next points to a statement by Senator Muskie, noting that
70 the prohibition requirement of Section 115 was included by the
71 Committee, because it "was presented with strong evidence that
72 any level of emissions of certain pollutants may produce
73 adverse effects that cannot be tolerated."^{35/} These two state-
75 ments, according to NRDC, show that all emissions of
76 non-threshold pollutants are to be prohibited. In fact, they
77 show no such thing.

78
79 Perhaps the most significant point to be made about
79 these statements is that they both were directed to a provision
81 in the Senate bill that would have explicitly required the
82 agency to prohibit emissions of air pollutants found to be haz-
83 ardous to the health of persons. Section 112, by contrast,
84 does not require such a prohibition, but instead directs the
85 Administrator to set a standard which, in his judgment, pro-
86 vides an ample margin of safety. NRDC assumes that language
87 requiring a prohibition of emissions is the same as language

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368 ^{34/} See Pet. Br. at 22; 1970 Leg. Hist. at 420.

374 ^{35/} Pet. Br. at 22; 1970 Leg. Hist. at 227.

388 directing the exercise of judgment to establish an ample margin
389 of safety. But the two approaches are different, and an
390 explanation of how a prohibition might work cannot indiscrimi-
391 nately be transmuted into an explanation of what was intended
392 by the phrase "ample margin of safety."

393
394 Moreover, the notion that "any level of emissions of
395 certain pollutants may produce adverse effects that cannot be
396 tolerated" does not mean that any level of risk of such adverse
397 effects cannot be tolerated, even if the risk cannot be elimi-
398 nated entirely without closing down an entire industry. In
399 fact, as will be shown below, Congress was well aware that
901 small risks of adverse health effects would necessarily have to
902 b tolerated and viewed such risks as being consistent with an
903 ample margin of safety in cases where it would be unnecessary
9 or impracticable to eliminate them.

905
906 Finally, NRDC calls attention to a statement by Sen-
907 tor Muskie summarizing the final legislation fashioned by the
908 Conference Committee. In this statement, Senator Muskie indi-
909 cated that the ample margin of safety standard "could mean,
910 effectively, that a plant would be required to close because of
911 the absence of control techniques. It could include an emis-
912 sions standard which allowed for no measurable emissions."36/

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913
912 36/ See Pet. Br. at 6; 1970 Leg. Hist. at 133 (emphasis
913 added).

13 NRDC places principal reliance on this statement for the con-
14 clusion that the ample margin of safety provision was intended
15 to require standards that completely prohibit emissions of
16 non-threshold pollutants, even if the standards result in the
17 closure of entire industries.

18
19 But there is a big difference between the possible
20 closure of a plant and the closure of entire industries, a
21 result which would logically flow from strict application of
22 NRDC's interpretation.^{37/} That Congress contemplated the clo-
23 sure of a plant does not demonstrate that it contemplated the
24 closure of entire industries as well. Indeed, perhaps the most
25 striking thing about the legislative history of the 1970 Amend-
26 ments is the absence of any discussion of broad-scale,
27 industry-wide closure resulting from the promulgation of stan-
28 dards for hazardous air pollutants. Surely Congress would not
29 have enacted a requirement that it expected would result in
30 such massive economic and social dislocation without discussing
31 the matter beyond a passing comment by one Senator that "a
32 plant" could be required to close.

34
35 Furthermore, the fact that a particular Section 112
36 standard could allow for no measurable emissions does not mean

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22 37/ See pp. ____ - ____, supra.

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337 that this was anticipated for all source categories of all haz-
339 ardous air pollutants. To the contrary, one of the substances
340 that Senator Muskie cited as an example of those that were
341 likely to be controlled under Section 112 was beryllium.^{38/}
342 Yet, the Senate Committee on Public Works had earlier explained
344 that beryllium emissions from steel plants might not have to be
345 prohibited under Section 115, since it would not be necessary
346 or practicable to do so.^{39/}

347
348 In short, NRDC's attempt to parlay three selected
349 statements from the legislative history into a clear expression
350 of congressional intent to require zero-risk/zero-emissions
351 standards for all non-threshold pollutants without regard to
352 the consequences simply does not work. If anything, these
353 statements indicate that, by moving from a requirement that
354 emissions be prohibited to a direction that emission standards
355 be promulgated, Congress specifically rejected the
356 zero-risk/zero-emissions approach advocated by NRDC. Moreover,
357 when the focus is expanded beyond these three statements and
358 the legislative history is considered more broadly, Congress'
359 rejection of a zero-risk/zero-emissions requirement emerges
360 with even greater clarity..

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342 ^{38/} See 1970 Leg. Hist. at 133.

346 ^{39/} See p. ____, infra.

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62 For on thing, even Section 115 of the Senate bill
62 (with its prohibition requirement) was not intended to require
65 zero-risk/zero- missions standards across-the-board. In dis-
66 cussing Section 115, the Senate Committee on Public Works
67 stated its recognition that complete control of all hazardous
68 air pollutants, for example, "complete control of beryllium
69 from steel plants, . . . may not be necessary or
70 practicable."^{40/} Accordingly, the Committee explained, EPA
71 would have authority under Section 115 not to require a prohi-
72 bition of all emissions from all categories of sources.^{41/}

74
75 There is nothing to suggest that when Congress ulti-
76 mately substituted the "ample margin of safety" test for the
78 prohibition requirement, it intended to depart from this recog-
79 nition that a complete prohibition of emissions at all sources
80 might not be necessary or practicable (and therefore not
81 required) under Section 112. If anything, the Conference Com-
83 mittee's switch from a prohibition of emissions to the
84 establishment of "ample margin of safety" standards suggests an
85 even greater concern with considerations of practicability.
86 Indeed, in presenting the Conference Committee Report on the
87 1970 Amendments to the House, Congressman Staggers explained:

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90
70 ^{40/} 1970 Leg. Hist. at 420 (emphasis added).

73 ^{41/} See id.

88 "The Conferees have been guided by two principles: to do what
90 is feasible and to do what is reasonable."42/

92
93 Subsequent congressional action confirms this under-
94 standing. For example, in 1976, the House Committee on Inter-
95 state and Foreign Commerce was considering amendments to the
96 Clean Air Act. In the course of its deliberations, the Commit-
97 tee paid particular attention to regulatory developments
99 involving vinyl chloride. Its report expressly recognized that
00 vinyl chloride was carcinogenic and that no safe level of
01 exposure could be defined.43/ Yet the Committee did not sug-
03 gest that a zero-emissions standard should be adopted under
04 Section 112. Instead, it urged EPA to promulgate without delay
05 the standard that had been proposed in December 1975,44/ a
06 standard based upon EPA's assessment of the best available con-
07 trol technology rather than on a zero-risk/zero-emissions
08 requirement.45/

009
010 Similarly, the deliberations on the Clean Air Act
011 Amendments of 1977 demonstrate Congress' clear understanding

014

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090 42/ Id. at 111:

001 43/ See H.R. Rep. 94-1175, 94th Cong., 2d Sess. at 23-24
002 (1976).

005 44/ See id.

008 45/ See pp. - , supra.

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12 that, if interpreted to mean zero risk, the "margin of safety
14 concept" would be "an illusion."^{46/} Congress also was aware
18 that it would be necessary "to get down to zero pollution in
19 order to eliminate all health effects."^{47/} Yet, it rejected
23 the proposition that ambient air quality standards must there-
23 fore be set at zero for non-threshold pollutants in order to
25 achieve a "margin of safety," since it recognized that such a
26 "no-risk philosophy ignores all economic and social conse-
27 quences and is impractical."^{48/}

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* * * * *

32
34 In short, the statutory language and legislative
35 history indicate that Congress did not intend to equate an
36 "ample margin of safety" with the absence of all risk or to
37 require a zero-risk/zero-emissions standard for all
38 non-threshold pollutants regardless of the consequences. While
40 Congress did express an overriding concern for public health
41 protection, it did not intend to require absolute safety;

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14 ^{46/} See A Legislative History of the Clean Air Act
15 Amendments of 1977, Comm. Print No. 16, Senate Comm. on the
16 Environment and Public Works, 95th Cong., 2d Sess. at 2577-79
17 (1978) (House Report) (hereafter referred to as "1977 Leg.
18 Hist.").

20 ^{47/} See id. at 1030-31 (remarks of Senator Muskie).

28 ^{48/} Id. at 2594 (House Report).

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042 rather, it viewed some level of residual risk as being compati-
044 ble with the existenc of an "ample margin of safety," as long
046 as the residual risk was not significant.^{49/} Moreover, Con-
061 gress contemplated that, so long as it did not substantially
062 interfere with the primary purpose of protecting the public
063 health, EPA could consider what would be feasible and practica-
065 ble in setting emission standards under Section 112.^{50/}

083 _____
083
045 ^{49/} Thus, the Senate Report on S.4358 (from which the
046 Clean Air Act Amendments of 1970 were derived) states that the
047 statutory scheme for regulating hazardous air pollutants was
048 intend d to ensure control of "stationary source emissions that
049 pose any significant danger to public health or welfare." 1970
050 Leg. Hist. at 420 (emphasis added). Similarly, in amending the
052 Clean Air Act in 1977, Congress approved both the opinion of
053 the en banc court in Ethyl Corp. v. EPA, 541 F.2d 1, 13, 30, 31
054 & n.62 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976) (holding
055 that the existence of "significant risk" is an appropriate test
056 for regulating under the Clean Air Act) and the dissenting
057 opinion of the three-judge panel in the Ethyl case (equating
058 the phrase "endanger the public health" with presenting a "sig-
059 nificant risk of harm"). See 1977 Leg. Hist. at 2511-12, 2516
060 (House Report).

065 ^{50/} Cf. Union Electric Co. v. EPA, 427 U.S. 246, 266, 268
067 (1976) (noting that the Clean Air Act Amendments of 1970 "allow
068 claims of technological and economic feasibility to be raised
069 in situations where consideration of such claims will not sub-
070 stantially interfere with the primary congressional purpose of
071 prompt attainment of the national air quality standards"). See
071 generally pp. 30-33, supra. In this regard, it also is impor-
072 tant to bear in mind that one of the stated purposes of the
073 Clean Air Act is "to protect and enhance the quality of the
074 Nation's air resources so as to promote the public health and
075 welfare and the productive capacity of its population." Sec-
076 tion 101(b)(1) of the Act, 42 U.S.C. § 7401(b)(1) (1982)
077 (emphasis added). If Section 112 were interpreted to preclude
078 any consideration of feasibility and to require the closure of
079 entire industries which emit non-threshold pollutants, the
080 quality of the nation's air certainly would not be enhanced in
081 a way that promotes the productive capacity of its population.

084 Finally, Congress committed the determination of what
085 emission level is consistent with an "ample margin of safety"
086 to the judgment of the Administrator, thereby authorizing him
087 to exercise his discretion by choosing a numerical limit within
088 a "zone of reasonableness."^{51/} In determining precisely where
093 within this zone a Section 112 emission limitation should be
094 set to provide an "ample margin of safety," the Administrator
096 is free to consider technological and economic feasibility, as
097 long as the standard that results from this process is suffi-
098 cient to protect the public health against significant risks of
099 mortality or serious illness.

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.05 D. Even if EPA's Application of Section 112 Is Not the
.06 Only Reasonable Interpretation of That Provision, It
.07 Clearly Is a Reasonable and Permissible
.08 Interpretation Which Should Be Respected by the
.09 Court.

.11
.14 In the present case, NRDC has offered an interpreta-
.15 tion of Section 112 that would require zero-emissions standards
.16 and preclude any consideration of feasibility. NRDC claims
.17 that its interpretation is compelled by the statutory language
.18 and legislative history of the Act. However, as demonstrated
120 above, a careful analysis of the statutory text and legislative

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088 ^{51/} Cf. Hercules, Inc. v. EPA, 598 F.2d at 106-107 ("In
090 reviewing a numerical standard, we must ask whether the
091 agency's numbers are within a 'zone of reasonableness,' not
092 whether the numbers are precisely right.").

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21 history belies this claim and indicates that a contrary reading
22 is both more reasonable and more consistent with congressional
23 intent.

24
25 Taken most favorably to NRDC, the statutory language
26 would have to be viewed as silent or ambiguous, since the term
27 "ample margin of safety" is not defined in the Act and, as dis-
28 cussed above, has no plain meaning.^{52/} Similarly, the most
29 that could be said of the legislative history to support NRDC's
31 position is that it evidences no clear expression of congres-
32 sional intent that feasibility must be considered in setting
33 Section 112 standards for non-threshold pollutants. There
35 surely is no "clearly discernible legislative intent"^{53/} sup-
37 porting NRDC's zero-risk/zero-emissions reading of the statute.
38 Rather, as the Supreme Court recently found in another context:
39 The ambiguous legislative history upon which [NRDC relies]
40 . . . falls far short of showing that the [agency's] . . .
42 interpretation of the Act is unreasonable."^{54/}

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29 ^{52/} See pp. ____ - ____, supra.

36 ^{53/} See General Motors Corp. v. Ruckelshaus, 742 F.2d
37 1561, 1567 (D.C. Cir. 1984).

42 ^{54/} See Pattern Makers League of North America, AFL-CIO
43 v. NLRB, ____ U.S. ____, ____, ____ U.S.L.W. ____, ____ (Sup. Ct. June 27,
44 1985).

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46 In these circumstances, as the Supreme Court and this
47 Court have recently and repeatedly made clear, courts should
48 refer to EPA's understanding of the statute as long as it is a
49 "sufficiently rational" and "permissible" construction of the
50 Act.^{55/} This is particularly true in light of the "technical
56 and complex" regulatory scheme of the Clean Air Act,^{56/} the
59 "inherent imprecision" of the term "ample margin of safety,"^{57/}
65 and the fact that the question of what constitutes an "ample
66 margin of safety" is committed to the judgment of the Adminis-
67 trator.^{58/}

73
75 As shown above, EPA's interpretation of Section 112,
76 which rejects a zero-risk/zero-emissions requirement and pro-
76 vides a limited role for consideration of feasibility, is per-
77 fectly consistent with the statutory language and legislative

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50 ^{55/} See Chemical Manufacturers Ass'n v. Natural Resources
52 Defense Council, Inc., __ U.S. __, __, S. Ct. __, __ (1985);
53 Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
54 __ U.S. __, __, S. Ct. __ (1984); General Motors Corp. v.
55 Ruckelshaus, 742 F.2d at 1566-67.

57 ^{56/} See Chevron U.S.A. Inc. v. Natural Resources Defense
58 Council, Inc., __ U.S. at __, __ S. Ct. __, __.

61 ^{57/} Cf. Association of Data Processing Service
63 Organizations, Inc. v. Board of Governors of the Federal
63 Reserve System, 745 F.2d 677, 696 (D.C. Cir. 1984).

67 ^{58/} Cf. Lead Industries Ass'n v. EPA, 647 F.2d at 1147
68 ("Deference to the Administrator's interpretation is particu-
69 larly appropriate in construing a statute that invests him with
70 a considerable amount of discretion."); Kennecott Copper Corp.,
71 Nevada Mines Div. v. Costle, 572 F.2d 1349, 1353 (9th Cir.
72 1978).

79 history of the Clean Air Act. It should be respected by this
30 Court.

81
84 Conclusion

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36 For the reasons discussed above, NRDC's petition for
87 review should be dismissed.

88
91 Respectfully submitted,

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